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Lieutenant Governor

State of Utah

DEPARTMENT OF NATURAL RESOURCES

MICHAEL R. STYLER
Executive Director

Division of Oil, Gas and Mining

JOHN R. BAZA
Division Director

November 15, 2013

S1605/0004
cc: Lynn

CERTIFIED MAIL 70101670000148103355

Kevin Butters
CE Butters Realty and Construction, Inc.
760 North Harrisville Road
Harrisville, Utah 84404

Subject: DECISION AND ORDER of Informal Conference Officer for Cessation Order
(Citation No. MC-2013-17-03)

Dear Mr. Butters:

This letter is to inform you that a Decision and Order has been entered to resolve the informal conference held on September 27, 2013 concerning Citation No. MC-2013-17-03. Because it has been determined that "mining operations" were being conducted, the fact of the violation is affirmed. However, based on your prompt compliance in filing a Notice of Intention to Commence Small Mining Operations, paying permit fees, posting a reclamation surety, and signing a reclamation contract for the site at issue, the proposed assessment in this case is lowered to \$264.00.

Pursuant to Utah Code Ann. § 40-10-22(3)(a) and Utah Admin. Code R645-401-800, you will have 30 days from the date of this Decision and Order to request a formal hearing before the Board of Oil, Gas, and Mining. A hearing may be requested by filing a written appeal with Julie Ann Carter, Board Secretary, P.O. Box 145801, Salt Lake City, Utah 84114-5801. If you have questions regarding the filing, she can be contacted at juliecarter@utah.gov or (801) 538-5277. If you have any other questions or concerns please contact me at (801) 538-5334.

Sincerely,

John Baza
Director
Division of Oil, Gas and Mining
Informal Conference Officer

JRB:kjw:er

Attachment (1)

cc: Paul Baker
Burl Malmborg



**BEFORE THE DIVISION OF OIL, GAS AND MINING
DEPARTMENT OF NATURAL RESOURCES
STATE OF UTAH**

**In the Matter of the Informal
Conference for the Fact of Violation and
Proposed Assessment for Citation No.
MC-2013-17-03, C.E. Butters Realty and
Construction**

DECISION AND ORDER

PROCEDURAL HISTORY

1. On July 29, 2013, the Utah Division of Oil, Gas and Mining ("Division") issued Citation No. MC-2013-17-03 ("July 29 CO") to C.E. Butters Realty and Construction ("Butters Construction") for conduction mining operations without first filing a Notice of Intention to commence mining operations and posting adequate reclamation surety. The citation was categorized as a Cessation Order, requiring immediate cessation of all mining activities at the site.
2. To abate the July 29 CO, Butters Construction was required to, by August 30, 2013: (1) file a Notice of Intention to commence mining operations; (2) provide a reclamation surety of \$25,000; and (3) sign a reclamation contract for the site.
3. On July 31, 2013, Mr. Kevin Butters, on behalf of Butters Construction, timely requested a stop work conference to review the July 29 CO.
4. On August 5, 2013, the Division held a stop work conference pursuant to Utah Admin. Code R647-6-4. The conference took place at the Department of Natural Resources Building, 1594 West North Temple, Salt Lake City, Utah. Daron Haddock, Coal Program Manager for the Division, served as the Stop Work Conference Officer. Lynn Kunzler, Inspector for the Division, facilitated the Division's presentation of arguments. Paul Baker and Tom Nicolaysen were also present on behalf of the Division.
5. On August 6, 2013, the Stop Work Conference Officer issued his Decision and Order regarding the July 29 CO. His decision was to uphold the July 29 CO due to the fact that the excavated materials were "not alluvial sand or gravel, but consist of larger bedded angular rock that required ripping by a large dozer to excavate." Stop Work Conference Decision and Order, ¶ 10. The Stop Work Conference Officer ordered Butters Construction to obtain a permit for the operation by filing a Notice of Intention and post adequate reclamation surety.
6. On August 14, 2013, a Proposed Assessment for the July 29 CO ("Proposed Assessment") was sent to Mr. Kevin Butters of Butters Construction. The Assessment

Officer determined that a civil penalty was warranted, but the amount of that penalty was not clear from the Worksheet for Assessment of Penalties and the accompanying cover letter. The cover letter indicated that "Rule R647-7-103 et. seq. has been utilized to determine the proposed penalty of \$3,300.00." However, the Worksheet concluded that a total of 45 assessment points should be imposed which, under Utah Admin. Code R647-7-103, equates to a civil penalty of \$2,750.00. The Worksheet itself, however, provided a total assessed civil penalty of \$2,860.00.

7. On August 30, 2013, Mr. Kevin Butters timely requested review of both the decision of the Stop Work Conference (the fact of the violation) and the Proposed Assessment.
8. Also on August 30, 2013, Mr. Kevin Butters: (1) filed with the Division Notice of Intention to Commence Small Mining Operations for Permit No. S/0005/004 and paid the necessary \$150.00 permit fee; (2) provided reclamation surety in the amount of \$31,000.00; and (3) signed a reclamation contract for the site.
9. On September 3, 2013, the Division filed a Termination of the July 29 CO because Butters Construction "has provided a Notice of Intent to Commence Small Mining Operations, has provided an adequate reclamation surety and has provided a reclamation contract." The effective date of abatement was August 30, 2013.
10. On September 9, 2013, in response to Butters Construction's August 30 request for review of the fact of the violation and proposed assessment, the Division scheduled an informal conference for September 27, 2013.
11. On September 27, 2013, the informal conference was held at the Department of Natural Resources Building, 1594 West North Temple, Salt Lake City, Utah. John Baza, Director of the Division served as the Informal Conference Officer. Lynn Kunzler, Paul Baker, and Dana Dean were present on behalf of the Division. Wayne Western, Assessment Officer, was also present and described the Proposed Assessment. Mr. Kevin Butters was present on behalf of Butters Construction. Burl Malmberg attended as a member of the public.
12. The Division explained that it inspected the site in June 2013 as a result of a citizen complaint. The Division found 3.9 acres of disturbance. It concluded that the operation was conducting "mining operations" under Utah Admin. Code R647-1-106 because the material being extracted by Butters Construction was *not* sand, gravel, or rock aggregate, but was solid rock which required a permit to be mined. The Division further explained that Butters Construction had promptly and satisfactorily abated the July 29 CO by filing a Notice of Intention, providing adequate reclamation surety, and signing a reclamation contract.
13. Mr. Kevin Butters explained that he did not feel that Butters Construction was conducting "mining operations." He said he looked at the Division website for guidance on whether he would need a permit for the activities he was conducting, and he determined, after review of a "Primer" (a PowerPoint document setting forth the

definitions of "mining operations," "sand," "gravel," "rock aggregate," and other pertinent definitions to mining) on the Division's website that he did not need to obtain a permit because the Primer suggested a permit is required only if an operation requires blasting. He said he was constructing a turnaround road for a private homeowners association and did not have to use any explosives for blasting to accomplish his job. Mr. Butters admitted that he was not a licensed geologist. Mr. Butters also expressed his dissatisfaction that the Division did not contact him prior to conducting an inspection on the site.

14. At the conclusion of the informal conference, the Informal Conference Officer ordered the parties to obtain more information before he made his decision. Specifically, the Informal Conference Officer asked for three things: (1) results of a county inspection on the property to assess whether the operation would require a county zoning change based on excavation activities; (2) a statement from the private homeowners association describing its involvement and expectations for the property in question; and (3) review and report of the site by a third party geologist to determine whether excavated material is in fact sand, gravel, or rock aggregate.
15. On October 9, 2013, the Division submitted the results of a Cache County inspection and a report of a third party geologist. The Informal Conference Officer waited 30 days from the date of the hearing to receive a statement from the private homeowners association, but no statement was submitted by either the Division or Butters Construction.
16. The Cache County Inspector's report concluded that a zoning change and conditional use permit would not be required by the County. He reasoned that "the extraction that occurred was related to, and provided for the improvement of the roadways within the development." However, the Inspector also explained that "if extracted material was used off-site and is not directly related to the Hideout at Scare Canyon development, the County Code requirements regarding extraction operations apply and must be accomplished prior to any further extraction from the site." The County Inspector's report also required cessation of further extraction and provided that Butters Construction must submit "a reclamation plan and reclamation surety, or evidence thereof" before building permits could be issued by the County.
17. The Division provided photographs taken on October 7, 2013 of a sign at the entrance of the Scare Canyon Ranch Association and Hideout Association showing "Landscape Rock" for sale by Butters Construction, suggesting the extracted material was being used off-site and not directly to the road construction project.
18. The Division also provided to the Informal Conference Officer an inspection report of Andrew Rupke, UGS Industrial Materials Geologist. Mr. Rupke explained that he visited the site on October 7, 2013 and concluded that the material being extracted by Butters Construction was bedrock. He based this determination on geologic mapping by Coogan and King (2001), as well as his personal observations of the coloring of the rock.

FINDINGS OF FACT

19. Butters Construction extracted bedrock from the subject property prior to August 30, 2013.
20. Butters Construction did not hold a valid permit to extract bedrock prior to August 30, 2013.
21. Butters Construction did not provide adequate reclamation surety to the Division prior to August 30, 2013.
22. Butters Construction immediately abated the July 29 CO by submitting the necessary paperwork, paying the required fees, obtaining a valid permit, posting adequate reclamation surety, and executing a reclamation contract with the Division on August 30, 2013.

CONCLUSIONS OF LAW

23. Butters Construction was engaged in "mining operations" under the definition of Utah Admin. Code R647-1-106.
24. Because Butters Construction engaged in "mining operations" prior to filing a Notice of Intention, the fact of the violation should be upheld. *See* Utah Code § 40-8-13 and Utah Admin. Code R647-3-101 (requiring operator to file a Notice of Intention prior to beginning mining operations).
25. Because Butters Construction engaged in "mining operations" prior to providing adequate reclamation surety, the fact of the violation should be upheld. *See* Utah Code § 40-8-14 and Utah Admin. Code R647-3-111.1 (requiring operator to provide reclamation surety prior to engaging in mining operations).
26. Because Butters Construction engaged in "mining operations" prior to filing a Notice of Intention and providing adequate reclamation surety, the following point assessment applies, pursuant to Utah Admin. Code R647-7-103:

History (0/25 points)

- Butters Construction has no previous violations on record with the Division. Therefore, no points are assessed for this category.

Seriousness (28/45 points)

Probability of Occurrence (20/20 points)

- Mining operations actually occurred before Butters Construction filed a Notice of Intention and provided adequate reclamation surety. Therefore, 20 points are assessed for this category.

Extent of Potential or Actual Damage (8/25 points)

- Butters Construction disturbed acreage at the subject property prior to filing a Notice of Intention and providing adequate reclamation surety. This disturbance totaled approximately 4 acres, but no evidence was submitted at the informal conference that showed this disturbance was or had the potential to be excessively harmful to public health and safety or the environment.¹ Therefore, 8 points are assessed for this category.

Degree of Fault (4/30 points)

- Butters Construction should have contacted the Division before engaging in mining operations. Failing to do so before extracting minerals from the site without a permit constitutes a lack of diligence or lack of reasonable care. However, it does not constitute a greater degree of fault because Mr. Butters researched the Division's website and attempted to determine whether he needed a permit. The Division's online "Primer" created confusion about whether a permit would be required. Thus, even though Butters Construction failed to obtain a permit prior to extracting bedrock, it cannot be said that this was more than a negligent act. Therefore, 4 points are assessed for this category.

Subtotal: 32 points

Good Faith (20/20 points)

- Butters Construction immediately complied with the abatement criteria set forth in the July 29 CO. Therefore, 20 points are deducted from the subtotal above.

Total: 12 points

27. Based on a total assessment of 12 points, a \$264.00 civil penalty is imposed. *See* Utah Admin. Code R647-7-103(3).

ORDER

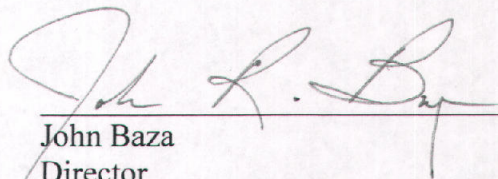
28. The fact of the violation for the July 29 CO is hereby affirmed.

29. The Proposed Assessment is hereby modified to reflect a total assessment of 12 points and a civil penalty in the amount of \$264.00.

¹ There was some discussion at the informal conference regarding water near the subject operation. After inspection of the site on October 7, 2013, the Division concluded that "there are two springs just over ½ mile from the quarry. Both with small ponds associated with them. Given the distance from the quarry, and the operation practices it is not likely the springs are being impacted by the operation. . . . [W]e were told by one of the owners that just 2-3 weeks previous, they had noted several moose, elk, deer, and 5 beaver in and around the first pond. Numerous tracks were also seen around the second pond. This would provide explanation of the murkiness of the water." Division Mineral Inspection Report at 2, October 9, 2013.

30. Butters Construction must pay the \$264.00 civil penalty to the Division within 30 days of the date of this Decision and Order.

SO ORDERED this 15th day of November, 2013.

A handwritten signature in cursive script, appearing to read "John L. Baza", is written over a horizontal line.

John Baza
Director
Division of Oil, Gas and Mining
Informal Conference Officer

RIGHTS OF APPEAL

Pursuant to Utah Admin. Code R647-7-107, you may request a formal hearing before the Board of Oil, Gas, and Mining to review the fact of the violation and/or the reassessed penalty. A hearing may be requested by submitting, within 30 days of the service date of this Decision and Order, (a) a written petition to the Board Secretary, Julie Ann Carter, P.O. Box 145801, Salt Lake City, Utah 84114-5801; and (b) an amount equal to the reassessed penalty (\$264.00 in this case) to the Division. If you have questions regarding the filing, please contact the Board Secretary at juliecarter@utah.gov or 801-538-5277.

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing **DECISION AND ORDER** to be mailed by email, First Class or Certified Mail with postage prepaid, this 15th day of November, 2013, to the following:

Kevin Butters
CE Butters Realty and Construction, Inc.
760 North Harrisville Road
Harrisville, Utah 84404
[Certified Mail
70101670000148103355]

Dana Dean
Associate Director
Utah Division of Oil, Gas and Mining
1594 West North Temple, Suite 1210
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danadean@utah.gov
[Via Email]

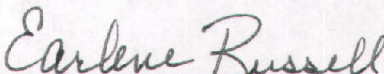
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Earlene Russell